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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 511th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 15 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (A/CN.9/XXVI/CRP.4)

1. Mr. SAHAYDACHNY (Secretariat) explained that the report of the drafting group was in the form of a corrigendum, showing the insertions and deletions made by the drafting group in the Working Group's text (A/CN.9/371, annex) in implementing the Commission's decisions. The first part of the report covered the preliminary matter and articles 1 to 10 of the Model Law. The remaining articles would be covered in addenda. In the final text of the Model Law, to be prepared by the drafting group, the articles would be renumbered as appropriate, and all cross-references checked.

2. The CHAIRMAN invited the Commission to consider the amendments to the draft Model Law article by article, beginning with the title.

Title

3. Mr. MORAN BOVIO (Spain) noted that the title in the Spanish version of the report spoke of "la contratación publica" instead of "la adjudicación de contratos públicos", the correct formula.

4. The text for the title proposed by the drafting group was adopted.

Preamble

5. The change proposed by the drafting group was adopted.

Article 1, paragraph (2) (a)

6. The proposed change was adopted.

Article 2 (b) (ii)

7. The proposed change was adopted.

Article 2 (c)

8. The proposed change was adopted.

Article 2 (g)

9. Mr. LEVY (Canada) said his delegation preferred the second of the two versions submitted by the drafting group (the "alternative version").

10. Mr. PEREZNIETO CASTRO (Mexico) said that, since stand-by letters of credit were unknown in many developing countries, it would be better to refer to "letters of credit" rather than "stand-by letters of credit".

11. Mr. BURMAN (United States of America) thought that both terms should be included. As a form of security, stand-by letters of credit were quite different from ordinary letters of credit.

12. Ms. ZIMMERMAN (Canada) said that, at its fourteenth session, the Working Group had agreed "to delete the reference to letters of credit from the illustrative list of instruments that could serve as tender securities so as not to give undue prominence to what would be an unusual use of ordinary commercial letters of credit in a guaranty function" (A/CN.9/359, para. 31).

13. Mr. AL-NASSER (Saudi Arabia) said that the verb "to secure" was not adequately rendered in the Arabic version of the definition.

14. The CHAIRMAN said the necessary correction would be made. He asked whether the word "stand-by" should be deleted.

15. Mr. MORAN BOVIO (Spain) thought that both the stand-by letter of credit and the ordinary letter of credit could be mentioned.

16. In reply to a question from Mr. WALSER (Observer for the World Bank), Mr. HERRMANN (Secretary of the Commission) said that the stand-by letter of credit was a special form of letter of credit which was a functional equivalent of an independent bank guarantee.

17. Mr. PHUA (Singapore) noted that tender securities were dealt with in the whole of article 27, and asked why only article 27 (1) (f) was referred to in the proposed text.

18. Mr. JAMES (United Kingdom) explained that the purpose of the reference was to define the obligations that could be guaranteed by means of a tender security. The obligations in question were set out in article 27 (1) (f).

19. The alternative version of article 2 (g) preferred by the drafting group was adopted.

Article 3 (b)

20. The proposed text was adopted.

Article 6, paragraphs (6) and (7)

21. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had found it hard to implement the decision of the Commission with regard to article 6. The Commission had decided that paragraph (6) of article 6 should be amended to include materially incomplete information concerning the qualifications of a supplier or contractor. The Commission had also decided that the supplier or contractor should be allowed, up to the deadline for the submission of tenders, to correct material inaccuracies or incompleteness in the information. That decision had caused difficulty. According to paragraph (7), the right of rectification was excluded where prequalification proceedings had taken place. On the other hand, where there had been no prequalification proceedings, the fact that tenderers had submitted inaccurate or incomplete information would usually only be discovered at the time when

(Mr. Sahaydachny, Secretariat)

the bids were opened; yet at that time the right to rectify such information would expire. It was therefore suggested that paragraph (7) be revised to make the deadline for providing complete proof of qualification either "within a reasonable time after the deadline for the submission of tenders or best and final offers" or "in the course of the procurement proceedings".

22. Mr. WALLACE (United States of America) pointed out that, according to the text proposed for paragraph (6) (b), a procuring entity could disqualify a supplier or contractor if it found at any time that the information submitted was materially inaccurate or incomplete. That provision would have to be made subject to paragraph (7).

23. Mr. HERRMANN (Secretary of the Commission) said that the drafting group had preferred to define the scope of application of paragraph (7) in relation to paragraph (6).

24. Mr. WALSER (Observer for the World Bank) agreed with the view that the original text of paragraph (7) raised problems, but had grave misgivings about the new text proposed, which would allow bidders to submit additional information or make corrections after the opening of tenders. There was a risk that a bidder would provide inadequate information so that, if his bid turned out to be too high after the opening of tenders, he could subsequently refuse to provide the further information required in order to be rejected without loss of tender security. In any case, it would be dangerous to allow the bidder merely "to undertake" to provide the necessary information; he should provide it immediately. He would prefer the paragraph to be dropped altogether.

25. Mr. JAMES (United Kingdom) said that the reference to paragraph (6) (a) in the proposed text for paragraph (7) was intended to make it clear that the right to complete the information or correct inaccuracies did not apply where the information was false. To avoid any ambiguity, paragraph (6) (b) should be made subject to paragraph (7).

26. Mr. PRIESTLEY (Observer for Australia) wondered whether paragraph (7) would apply to a supplier or contractor who had already prequalified but whose tender contained inaccurate or incomplete information. The first phrase of paragraph (7), "except where prequalification proceedings have taken place" was perhaps unnecessary.

27. Ms. ZIMMERMAN (Canada) felt that the word "may" in paragraph (6) (a) should be changed to "shall" in order to make the obligation to disqualify a supplier or contractor for false information mandatory rather than discretionary.

28. Mr. TUVAYANOND (Thailand) expressed agreement with what had been said by the representative of the World Bank. To allow suppliers or contractors to rectify incomplete or inaccurate information after the deadline for the submission of tenders would open the door to abuse.

29. Mr. PEREZNIETO CASTRO (Mexico) also considered the remarks of the representative of the World Bank to be highly relevant. The problem was to define the deadline for the rectification of inaccurate or incomplete

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(Mr. Pereznieto Castro, Mexico)

information. As far as deleting the reference to prequalification proceedings was concerned, he thought that prequalified bidders would already have demonstrated their qualifications.

30. Mr. WALLACE (United States of America) said that it would perhaps be sufficient for paragraph (7) to deal solely with the case of the rectification of materially inaccurate or incomplete information. Regarding the question raised by the observer for Australia, he pointed out that, under paragraph (8) of article 7, a prequalified bidder could be required to update his qualification. The reference to prequalification proceedings in paragraph (7) of article 6 had been deliberately included to rule out a supplier or contractor that had failed to qualify.

31. Mr. TUVAYANOND (Thailand) said that the procuring entity should perhaps be allowed to disqualify a bidder if it had reasonable grounds to believe that the latter was using the provision as a loophole to avoid his responsibilities. But a supplier or contractor should not be disqualified for minor or unintentional errors.

32. Mr. JAMES (United Kingdom) said that the first phrase of paragraph (7) had been included because the question of prequalification was dealt with elsewhere in the Model Law. A bigger problem was the point raised by the observer for the World Bank. As a procuring entity would not discover a defect until the opening of tenders, the drafting group had felt that paragraph (7) as amended by the Commission did not make sense. The Commission had decided that the supplier or contractor should be given the opportunity to make corrections, and therefore it had to decide between the two deadline options proposed in paragraph (7) in square brackets. He himself slightly preferred the first option but had no strong feelings. If neither was acceptable, there was no point in retaining paragraph (7).

33. Mr. PRIESTLEY (Observer for Australia) thought that the policy decided upon the previous week should be adhered to. His question regarding the first phrase of paragraph (7) concerned the situation in which a supplier or contractor had prequalified and submitted a tender which, on being opened, proved to contain materially inaccurate or materially incomplete information. Would that supplier or contractor be given a chance to make corrections? The problem did not arise with the original version of paragraph (7).

34. Mr. AL-NASSER (Saudi Arabia) said that paragraph (7) provided an opportunity for abuse and should be deleted unless a more satisfactory text could be produced.

35. Mr. WALSER (Observer for the World Bank) agreed with the representative of Canada that paragraph (6) (a) should be mandatory and that "may" should be amended to "shall". In regard to paragraph (7), it was a well-accepted principle in public procurement throughout the world that a bid that was not acceptable as submitted could not be made acceptable later. That would be an open door to abuses not in the public interest. A bidder might deliberately provide incomplete information in order to be able to withdraw, or complete the information if he saw it as profitable to remain in the competition. In

(Mr. Walser, observer for the World Bank)

prequalification proceedings, where no money or legal commitment was involved, something like paragraph (7) made sense, but a tender had to be legally binding and provide for a penalty - loss of tender security - in the case of withdrawal.

36. Mr. PEREZNIETO CASTRO (Mexico) supported that position. In his view, the only case in which it would be unjust to rule out the possibility of submitting further information was when such information was not available to or obtainable by the supplier or contractor at the time. The latter could then be given a chance to submit it later.

37. Mr. LEVY (Canada) said that his delegation had come to the conclusion that the Commission should stop trying to be generous to bidders and close off the opportunity to make any corrections whatsoever after the deadline for submission of tenders. Alternatively, the entire paragraph should be deleted.

38. Mr. TUVAYANOND (Thailand) proposed that, instead of the two formulas in square brackets, the word "promptly" be inserted. It should be left to the discretion of the procuring entity to decide whether or not a bidder, particularly if he was the most promising one, should be allowed to remain eligible to execute the contract in a case in which he had made a minor or unintentional error. His delegation was not looking at the question from the point of view of generosity but of the interests of the country. In the course of informal discussions the question of corruption had been raised; in spite of the existence of corruption in many countries, Governments should operate on the presumption of good faith.

39. Mr. KINGA (Cameroon) said that any reputable bidder would be expected to discover his errors between the times of submission and opening of tenders and it should not be necessary to give further time for correction. His delegation was in favour of the proposal to delete paragraph (7) in its entirety.

40. Mr. WALSER (Observer for the World Bank) thought that subparagraph (1) (a) of article 29 covered the case of minor errors raised by the representative of Thailand.

41. Mr. KOMAROV (Russian Federation) said that Thailand's concerns would also be met by paragraph (6) (b) of article 6, which would not authorize disqualification for minor errors. Article 22 dealt with similar questions.

42. Mr. JAMES (United Kingdom) said that, despite those reassurances, the difficulty concerned the potential problem of impermissible conduct on the part of the procuring entity. It had been pointed out that officials of a procuring entity might scrutinize the documentation of tenders that they wished to reject in order to find some technical matter which would justify disqualification. On balance, he felt that paragraph (7) was required, although the wording of the drafting group needed tightening. The proposal to insert the word "promptly" would certainly be acceptable, or a precise deadline of 14 or 28 days might be specified.

43. Mr. WALSER (Observer for the World Bank) thought the text might state that a bidder should not be disqualified for non-material errors provided that the necessary information was submitted either promptly or within a given period, whichever the Commission might prefer.

44. Mr. MORAN BOVIO (Spain) said that the Commission might also consider the possibility of a bidder being allowed to submit incomplete documentation on the undertaking that the documentation would be completed within a certain time period. If necessary a sworn undertaking could be made. That procedure was used frequently in both administrative and judicial proceedings, and would fit in with other proposed formulations. The Commission should in any event try not to be excessively rigid.

45. Mr. PRIESTLEY (Observer for Australia) supported the idea put forward by the representative of the World Bank and suggested a subparagraph (c) of paragraph (6) reading: "A procuring entity may not disqualify a supplier or contractor on the ground that the information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect". It would then be possible to delete paragraph (7).

46. Mr. LEVY (Canada), supported by Mr. RENGER (Germany), said that his delegation preferred the deletion of paragraph (7) because special cases made bad law. It supported the Australian suggestion for a subparagraph (c) of paragraph (6).

47. Mr. WALSER (Observer for the World Bank) said that his delegation also supported the deletion of paragraph (7). It could accept the Australian suggestion with the addition of the words "provided that the supplier or contractor remedies such deficiency promptly on being requested to do so by the procuring entity".

48. Mr. PHUA (Singapore) wondered whether it would be better to retain the original wording of paragraph (7) as set out in the draft Model Law.

49. Mr. JAMES (United Kingdom) asked whether it was proposed that the words "except where prequalification proceedings have taken place" should be kept.

50. It was also necessary to include the words "other than in a case in which paragraph (6) (a) of this article applies", because the procuring entity should in any case be entitled to disqualify a supplier or contractor who gave false information.

51. Mr. PRIESTLEY (Observer for Australia) said that he understood the word "false" in the proposed subparagraph (a) of paragraph (6) to imply deliberate falsehood; a supplier or contractor providing such "false" information should be disqualified.

52. Mr. KOMAROV (Russian Federation) wondered whether application of subparagraphs (b) and (c) would mean that any mistake concerning substance or any inaccuracy or incompleteness, whether formal or concerning substance, would give the right to disqualify the supplier or contractor. The term "materially" did not indicate the scale of the mistake.

53. Mr. PRIESTLEY (Observer for Australia) said that subparagraph (b) concerned an inaccuracy or incompleteness relating to substance. Even a formal mistake relating to substance would be included.

54. Subparagraph (c) was designed to refer to mistakes not relating to substance, so that a procuring entity would be prevented from seizing upon an inaccuracy or incompleteness that was, in reality, of no commercial importance to it.

55. Mr. PHUA (Singapore) said that the Commission had not dealt with the situation where information was accurate but the contractor had not provided proof. That had been the original intention behind paragraph (7).

56. Mr. JAMES (United Kingdom) said that the point made by the representative of Singapore was valid. He wondered whether the Commission was discussing proof or statements about qualifications or both.

57. Mr. WALSER (Observer for the World Bank) wondered whether there was a need to add the words "except where prequalification proceedings have taken place". In his delegation's view, there was no place for those words in the proposed new subparagraph (c).

58. If prequalification had already taken place and it was subsequently found that there was a minor non-material incompleteness in the prequalification submission, that would not be a reason for disqualifying the supplier or contractor.

59. The CHAIRMAN asked the representatives of the United Kingdom and Thailand and the observer for Australia to endeavour to produce a suitable form of words to assist the drafting group.

The meeting rose at 5.05 p.m.